BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID D. AUMILLER, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,002,887
AMERICAN PACKAGING CORP.	)	
Respondent	)	
AND	)	
	)	
FEDERATED MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the August 31, 2004 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The parties waived oral argument and the Board moved this matter to its summary calendar on February 15, 2005.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and Federated Mutual Insurance Company.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that claimant sustained an additional ten (10) percent impairment of function to the body as a whole for the aggravation caused by the February 8, 2002 work-related accident.

Claimant asserts the record establishes that on February 8, 2002, he was injured as a result of a work-related accident and suffered a new injury and/or aggravation to his low back. And that as a result of this injury, he suffered a new and distinct condition which required surgery. Claimant's treating physician Douglas C. Burton, M.D., provided medical

testimony that as a result of the new injury claimant is entitled to a 20 percent functional impairment rating to the body as a whole under the *Guides*.[1] Claimant contends the ALJ erred in reducing that 20 percent impairment by 10 percent for the preexisting impairment.

Respondent and Federated Mutual Insurance Company (Respondent) point to claimant's history of prior back problems, and contend his most recent fusion surgery was not necessitated by the February 8, 2002 accident, but was instead the natural and probable result of a January 2001 accident and a March 22, 2001 surgery, or, in the alternative, a September 2001 incident. But if the February 8, 2002 accident is compensable, then respondent contends it is entitled to a credit for claimant's preexisting impairment.

The issues for the Board's review are the nature and extent of claimant's disability, and whether claimant's injury arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Before his current work-related injury claimant suffered and settled three (3) other workers compensation claims. The first injury was May 6, 1992, while employed at Collins Bus Corporation; the second injury was December 8, 1997, at American Packaging Corporation; and the third injury was January 18, 2001, while claimant was likewise employed by respondent.

The claimant's first injury was a herniated disk at L5-S1. Claimant underwent surgery as a result of the 1992 injury and his surgeon, Paul S. Stein, M.D., opined that claimant sustained a 15 percent impairment to the body as a whole. Dr. Stein opined that if he were rating the same symptoms and patient under the *Guides* (4th ed.), he would find a ten (10) percent whole person impairment based on a DRE Lumbosacral Category III impairment.

As a result of the 1997 injury, Blake C. Veenis, M.D., found claimant had a one (1) percent whole person impairment to his back. Dr. Veenis referenced the *Guides* (4th ed.), specifically, the DRE Lumbosacral Category II, when assessing claimant's impairment.

Claimant started working for respondent in 1993. Claimant was a warehouse supervisor at the time of the August 9, 2002 preliminary hearing.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

After the January 18, 2001 injury, claimant again underwent surgery and was unable to return to work until May 14, 2001. At the time of the August 9, 2002 preliminary hearing, the 2001 claim (Docket No. 1,004,534) and this claim were both still pending. On January 16, 2004, claimant and respondent's previous insurance carrier, TIG, appeared for a settlement hearing before Special Administrative Law Judge John C. Nodgaard to conclude Docket No. 1,004,534 and the claimant received a lump sum payment for a full and final settlement of that docketed claim.

The January 2001 injury occurred while claimant was driving a fork lift and was trying to unload a full tractor-trailer. The dock plate dropped unexpectedly about a foot under the fork lift and sent claimant bouncing up causing him to bump his head on the roof of the fork lift. Claimant denied any head or neck pain. When he landed, his right buttock and hip area were sore. He returned to work the following morning. However, the pain flared and by around noon claimant had developed some numbness in the right leg. Respondent took claimant to Hutchinson Hospital and claimant was seen by David W. Paine, M.D. Dr. Paine obtained a history from claimant, reviewed x-rays and examined claimant. He diagnosed claimant with acute lumbar disk syndrome with no motor compromise. Dr. Paine admitted claimant to the hospital and treated him with medications and bed rest. He referred claimant to John Knudsen, III, M.D., for a lumbar epidural steroid injection, which was performed on the same day. Claimant was eventually referred to Dr. Earl C. Mills, a board-certified neurosurgeon.

On March 22, 2001, Dr. Mills performed back surgery on claimant, consisting of a partial hemilaminectomy at L4 on the right, a partial hemilaminectomy at L5 on the right, a partial facetectomy at L4-L5 on the right, a foraminotomy of the L5 nerve root on the right side, and an excision of a large herniated disk at the L4-L5 level on the right side. However, Dr. Mills did not address the bulging disk at L5-S1 on the left since claimant was asymptomatic.

Subsequent to the surgery, and before any new alleged injury, the claimant developed a popping sensation in his back. Initially, the popping occurred a couple of times each week. And although the frequency decreased over time, the pain associated with each pop increased over time. Claimant believed this popping sensation was a result of his January 2001 injury and subsequent surgery as the popping started "so close to after I had the surgery."[2] Claimant reported this popping sensation to Dr. Mills but was released to return to work effective May 14, 2001. After returning to his job duties, the popping sensation continued. And in September 2001, while attending the Kansas State Fair, claimant's back popped while carrying his daughter, who weighed approximately 30 pounds. The pain made claimant fall to the ground. Claimant had excruciating pain in his low back and down his leg. He was taken to the emergency room and admitted to the hospital for several days. After being released, claimant returned to Dr. Mills on

[2] P.H. Trans. (Aug. 9, 2002) at 29.

September 14, 2001, and was later released back to work. Dr. Mills testified the logical explanation for the September 2001 Kansas State Fair incident was that a disk fragment was missed during the claimant's original surgery in March 2001. An MRI taken after the September 2001 Kansas State Fair incident indicated claimant suffered a herniated disk at L5-S1 which, according to Dr. Mills, was a new finding because that disk had not been herniated before. However, this is the same disk which Dr. Stein had operated on in 1992 as it was herniated.

In January 2002, while at work carrying corrugated tubes that are bundled in groups of five and weigh a total of approximately 35 pounds, the claimant felt another pop in his back and fell to the ground. Again, claimant had pain down his leg and was taken to the emergency room. Claimant returned to Dr. Mills on January 30, 2002, who returned claimant to his regular work duties. Finally, on February 8, 2002, while claimant was driving a fork lift at work, the dock plate between the truck and dock slipped and the fork lift fell approximately eight to ten inches. This caused the claimant to bounce causing pain down his left leg. Claimant was again taken to the Hutchinson Hospital emergency room. Claimant returned to Dr. Mills on February 22, 2002, and at that time, Dr. Mills recommended another surgery.

Claimant underwent a third back surgery on January 27, 2003, by Douglas C. Burton, M.D. Prior to claimant's surgery, Dr. Burton gave the claimant three options: live with the pain, re-enter physical therapy, or have a fusion of the lumbar spine. At the time of his initial examination, Dr. Burton did not have the medical records of Dr. Mills to review. The claimant reported to Dr. Burton that his symptoms at the time of this initial examination were about the same as they were after the September 2001 Kansas State Fair incident. Dr. Burton regarded this as a permanent aggravation of the claimant's January 2001 accident. Claimant chose to proceed with the fusion surgery at L4-L5 and L5-S1. During the surgery, Dr. Burton found that one of the facet joints at L4-L5 was incompetent and determined that this caused the popping sensation in claimant's back. This was the same popping sensation which occurred so close after the March 22, 2001 surgery. The slippage of the facet joint was likely responsible for the pain that claimant suffered from a further aggravation while carrying his daughter at the Kansas State Fair. Dr. Burton testified that the popping sensation worsened after September 2001, which led to the fusion. Dr. Burton opined that claimant's February 8, 2002 accident at work exacerbated his preexisting condition of degenerative disk disease and caused the symptoms and diagnosis for which claimant had his two-level fusion surgery on January 27, 2003. Dr. Burton determined claimant sustained a 20 percent whole person impairment to his back based on the *Guides*.[3]

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

Claimant has a history of low back problems that pre-date the accident alleged in this case. Nevertheless, it is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] "The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition."[9]

Before the February 8, 2002 injury claimant's low back had been rated as having a 10 percent impairment of function based upon the DRE Lumbosacral Category III of the AMA *Guides* (4th ed.). After the February 8, 2002 injury claimant has a 20 percent functional impairment based upon DRE Lumbosacral Category IV. Both ratings involved degenerative disk disease at the L4-S1 level, but the 10 percent rating by Dr. Stein included a diagnosed disk herniation with radiculopathy which was surgically excised, whereas Dr. Burton's 20 percent rating included the diagnosis of segment instability that was surgically repaired by a two-level fusion. Claimant argues that he should receive permanent partial disability compensation for the entire 20 percent impairment because it represents a new condition. The ALJ disagreed and so does the Board. Because both conditions resulted from trauma superimposed on preexisting degenerative disk disease at the same level of the spine, the claimant's February 8, 2002 injury is an aggravation of

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[4] K.S.A. 44-501(a); *See also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[5] K.S.A. 2001 Supp. 44-508(g); *See also in re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[7] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 3, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

a preexisting condition. Accordingly, the preexisting 10 percent permanent impairment is part of the 20 percent rating under the *Guides*. Therefore, respondent is entitled to a credit under K.S.A. 44-501(c).

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[10]

And functional impairment is defined by K.S.A. 44-510e, as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the AMA *Guides*, if the condition is addressed by those *Guides*. The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.[11]

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.[12] Based upon the record taken as a whole, the Board agrees with the ALJ's conclusion that claimant had a 10 percent preexisting permanent impairment for which respondent is entitled to a credit against the claimant's present 20 percent impairment resulting from his February 8, 2002 accident. Respondent is not entitled to an additional credit for the lump sum settlement in Docket No. 1,004,534, nor for the 1 percent rating provided by Dr.

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[10] K.S.A. 44-501(c).

[11] *See Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

[12] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Veenis. A lump sum settlement does not establish nor is it the equivalent of a determination of the percentage of impairment.[13] Likewise, it would be speculation to attribute the rating by Dr. Veenis as additional preexisting impairment absent additional medical testimony. Dr. Veenis did not testify. His April 28, 1998 report describes claimant as relatively symptom-free. It is not clear whether he is rating claimant's total impairment or just the December 8, 1997 aggravation. Accordingly, the Board finds Dr. Stein's testimony to be the most credible opinion on claimant's preexisting impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated August 31, 2004, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and Federated Mutual Ins. Co.
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[13] *Baxter v. L. T. Walls Constr. Co.*, 241 Kan. 588, 593, 738 P.2d 445 (1987); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).